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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

vs.

CITY OF TALLAHASSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

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CITY OF TALLAHASSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, entered on August 16, 1962.

OPINIONS BELOW

Upon the conviction of the Petitioners in the Municipal Court of the City of Tallahassee, an appeal was taken to the Supreme Court of Florida. On November 1, 1961, the Supreme Court of Florida entered its opinion transferring the appeal to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. That opinion was reported in 134 So.2d 228 (Fla. 1961) (Appendix A). The Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, affirmed the convictions below on August 16, 1962. An opinion was rendered but not reported. (Appendix B)

JURISDICTION

The judgment of affirmation of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, was pronounced on August 16, 1962. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. §1257 (3).

Article V. Section 6 (3), of the Constitution of the State of Florida provides:

> "Section 6. Circuit Courts.—
>
> "(3) Jurisdiction. The circuit courts shall have . . . final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace . . . "

From the final judgment of affirmation by the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, after the taking of an appeal from the Municipal Court, Petitioners have no further appellate remedy under the Constitution and laws of the State of Florida.

QUESTION PRESENTED

Where a group of Negro and white citizens traveling in interstate commerce arrive at a municipally-owned and operated airport terminal with the publicly announced purpose of determining whether a restaurant and other public facilities in that terminal are available to Negroes on a racially unsegregated basis; and where said restaurant is segregated for the exclusive use of white persons; and where said group seeks food and drink at said restaurant but finds said restaurant closed to them; and where a hostile crowd, which resents the presence and the purposes of said group of Negro and white persons, gathers outside said terminal building; and where said group of Negro and white persons are peaceable and quiet in their words and conduct; and where police and other City officials arrest said group for unlawful assembly, but arrest no one in the hostile crowd; did the arrest and subsequent convictions of the members of said group constitute a denial of due process of law and equal protection of law, an abridgement of privileges and immunities, a denial of freedom of speech and assembly under the Fourteenth Amendment to the Constitution of the United States, a denial of rights under Article I, Section 8, Clause 3 (Interstate Commerce Clause) of the Constitution of the United States, as also a violation of 72 Stat. 737, 49 U.S.C.A. Sec. 1301 et seq (Federal Aviation Act of 1958).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Cited:

(1) The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizenship of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) The Interstate Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) provides as follows:

> "Section 8. The Congress shall have power to . . .
>
> "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

(3) Article IV, Section 2, of the Constitution of the United States provides as follows:

> "Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Florida Constitution Cited:

Article V, Section 6 (3), of the Constitution of the State of Florida as above set forth.

Statutes Cited:

(1) F.S. 870.04 (Laws of Fla. 1961, c. 61-237) provides as follows:

> "870.04. Magistrate to disperse riotous assembly.
>
> "If any number of persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in any county, city or municipality, the sheriff or his deputies, or any constable or justice of the peace of the county, or the mayor, or any commissioner, councilman, alderman or police officer of the said city or municipality, or any officer or member of the Florida highway patrol, shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the State command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present being so commanded to aid and assist in seizing and securing such rioter or persons so unlawfully assembled, or in suppressing such riot or unlawful assembly, refuses or neglects to obey such com-

mand, or, when required by such officers to depart from the place, refuses and neglects to do so, he shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly. As amended Laws 1961, c. 61-223, §1; Laws 1961, c. 61-237, §1."

(2) 72 Stat. 737, 49 U.S.C.A. Sec. 1301 is set forth below.

STATEMENT OF THE CASE

A. Petitioners, comprising a party of Negro and white clergymen, had set forth together from Washington, D. C., to cities in several southern States for the purpose of determining whether certain interstate transportation facilities were available on an integrated basis for persons of the colored race. Petitioners arrived at the Greyhound Bus terminal in Tallahassee on June 15, 1961, and were met by hostile persons who resented their presence and the purpose of their trip. At this time, Petitioners were protected by the local police from any violence. Petitioners procured airline tickets for their return trip to their final destination at New York, New York, and Newark, New Jersey, and then left the bus terminal for the City-owned and operated Tallahassee Municipal Airport preparatory to embarking upon their return flight, and they arrived at the airport in the early afternoon on June 15, 1961.

Upon their arrival, Petitioners sought to be served food and drink at the restaurant located in the terminal, the same being an integral part of the terminal facilities

designed primarily for service to passengers in interstate transportation. The Petitioners discovered, however, that this restaurant was closed to circumvent the necessity for service on a non-segregated basis. Petitioners decided to wait until the restaurant re-opened and in connection therewith they cancelled their reservations for their return trip. They waited in the terminal building until approximately 11:00 p.m. that evening and thereafter returned to the airport on the morning of June 16, 1961. The restaurant was still closed. Petitioners thereupon again cancelled their reservations and made new reservations for their return flight for later that day. While Petitioners were seated in the terminal building awaiting the opening of the restaurant, the City Attorney for the City of Tallahassee approached the Petitioners and demanded that they disperse. Petitioners declined to disperse, and they were thereupon arrested by the police and taken into custody.

The Petitioners' conduct was peaceable at the time of their arrival in Tallahassee, during the time they were at the bus terminal, while they were at the airport terminal, and at the time of their arrest; and at all times material to the matter herein they were quiet, dignified, and polite in their words and acts.

The Petitioners were charged as follows:

> "BEFORE ME, JOHN A. RUDD, Judge of the Municipal Court of the City of Tallahassee, Florida, personally appeared JAMES MESSER, JR., and EDW. J. HILL, who, being duly sworn, say that on, to-wit: the 16th day of June, 1961, upon property owned and operated by the City of

Tallahassee, Florida, and located in Leon County, Florida, namely, the Tallahassee Municipal Airport, ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY, CHAS. A. HUNTER, JOHN J. POLAND, JR., and PRISCILLA G. STEPHENS: COUNT I, Did then and there unlawfully assemble in that they did, and they being more than three (3) persons, meet together to commit a breach of the peace, acting together and concertedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled a police officer of said City did go among these persons so assembled, and making himself known to them and each of them, did, in the name of the State and City, command those so unlawfully assembled to immediately and peaceably disperse, and they and each of them did then and there refuse and/or neglect to obey such command when given, contrary to the laws and ordinances of said

City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida."

Petitioners moved to quash the aforesaid charges, but the said motions were denied. Following the trial, the Municipal Court of the City of Tallahassee found the Petitioners guilty of unlawful assembly as charged and ordered them to pay fines of $500.00 each or, alternatively, to serve sixty (60) days each in the City Jail. Petitioners thereupon filed an appeal in the Supreme Court of Florida. The Supreme Court of Florida ruled that it lacked jurisdiction to entertain the appeal and transferred the appeal to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, said court having final appellate jurisdiction on all appeals from Municipal Courts in the State of Florida. The Circuit Court subsequently entered its order affirming the judgment of conviction of the Municipal Court.

B. Federal Questions Raised Below in the Trial Court and Before the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, having Appellate Jurisdiction.

The Federal questions were first raised prior to arraignment on the day of the trial when the Petitioners moved to quash and dismiss the charges on the grounds that they were being deprived of their rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and that Chapter 61-237 (F.S. 870.04) was unconsitutional under the said provisions of the United States Constitution (Appendix C).

Subsequent to the convictions in the Municipal Court, the Petitioners appealed to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. In their Assignments of Error, they again raised their defenses of denial of rights under the First and Fourteenth Amendments to the Constitution of the United States (Appendix D).

ARGUMENT

I.

Petitioners submit that their arrests and convictions violate the guarantees of due process of law contained in the Fourteenth Amendment to the Federal Constitution for the reason that there was no evidence whatsoever supporting a conviction for unlawful assembly.

In *Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960), the petitioner had been charged with loitering and with disorderly conduct arising out of his allegedly being "argumentative" with the police over his arrest. The United States Supreme Court reviewed the entire record and found that there was no evidence to convict the petitioner. The Court stated categorically that it is a "violation of due process to convict and punish a man without evidence of his guilt" (4 L.Ed.2d 654, 659). As to the charge of disorderly conduct, the Court noted that:

> "There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good

order and tranquility of the City of Louisville." (4 L.Ed.2d 654, 659)

This principle was re-affirmed by the United States Supreme Court in *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed.2d 207, 82 S.Ct. 248 (1961), wherein the Supreme Court set aside convictions of "sit-in" demonstrators who had been charged with unlawful assembly and which convictions were not based upon evidence to support the findings of any violations of the State's unlawful assembly statute.

In *Taylor v. Louisiana*, 370 U.S. 154, 8 L.Ed.2d 395, 82 S.Ct. 1188, the Supreme Court of the United States held that a State conviction for disturbing the peace was based on constitutionally insufficient evidence where proof showed only the entry of a Negro into a white waiting room at an interstate transportation facility.

II.

Petitioners submit that their arrests and convictions violate their freedom of speech and assembly as guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution. The announced purpose of Petitioners' trip was to determine whether restaurant and other facilities in interstate transportation terminals were available to Negroes on an unsegregated basis, and they peacefully assembled and peacefully demonstrated to communicate their opposition to the admitted practice of racial segregation.

Petitioners' activities are entitled to the same protection as that given to peaceful picketing, and their conduct

is protected by the principles announced by the United States Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

The conditions obtaining in the case at Bar have a striking analogue in the case of *Cooper v. Aaron*, 358 U.S. 1, 3 L.Ed.2d 5, 78 S.Ct. 1401 (1958), where the School Board of Little Rock, Arkansas, petitioned the Federal courts for delay in the program of school desegregation at that city's Central High School because of community hostility and violence towards Negroes. The Supreme Court of the United States refused to suspend the desegregation order and held that such violence did not afford a basis for denying the Negro students their civil rights. The Court stated that:

> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature (of Arkansas)."

In *Rockwell v. Morris*, 211 N.Y.S.2d 25, affirmed 215 N.Y.S.2d 502 (1961), cert den 368 U.S. 913, 7 L.Ed.2d. 131, 82 S.Ct. 194 (1961), the appellant, a self-styled American Nazi, ha dapplied for a permit to use a public park in New York City to make a public political speech and had been denied the permit on the ground that if he spoke it was "inevitable that public disorder and rioting will result" (211 N.Y.S.2d 25, 28). The New York Court, however, held that the denial of the permit was an unconstitutional prior restraint on freedom of speech. The Court was presented with a community situation much like that in the case at Bar. New York City, with two and one-half million Jews,

was obviously a hostile ambiance for a neo-nazi propagandist. Tallahassee, a city practicing apartheid in many respects, has been anything but hospitable to those who have urged a change in its attitudes in its race relations.

III.

The arrests and convictions of the Petitioners constitute an undue burden on passengers in interstate commerce in violation of the Interstate Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution under the principles announced by the Supreme Court of the United States in *Morgan v. Virginia*, 328 U.S. 373, 90 L. Ed. 1317, 55 S.Ct. 1050 (1946); *Edwards v. California*, 314 U.S. 160, 86 L.Ed. 119, 62 S.Ct. 164 (1941); *Boynton v. Virginia*, 364 U.S. 454, 5 L.Ed.2d 206, 81S.Ct. 182 (1960.)

IV.

The aforesaid arrests and convictions deprived Petitioners of one of the basic privileges and immunities of Federal citizenship, namely, the right to travel throughout the nation free of unreasonable restraint imposed by the States and unfettered by unlawful arrests. This right of national citizenship, guaranteed by Article IV, Section 2, of the United States Constitution, was announced by the Supreme Court long ago in *Crandall v. Nevada*, 73 U.S. 35, 18 L.Ed. 745 (1868), and was re-affirmed in *The Slaughter-House Cases*, 83 U.S. 36, 21 L.Ed. 394 (1873); *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 S.Ct. 14 (1908).

V.

The arrests and convictions constitute state denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, because the police and city officials arrested the Petitioners who were peacefully demonstrating against unlawful racial segregation; instead of arresting a single one of the violent demonstrators outside the terminal; and this discriminatorily applied c. 61-237, Acts of Florida 1961 (F.S. 870.04) in contravention of the principles announced by the United States Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886) and in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961).

The Petitioners' arrests and convictions for unlawful assembly, while interstate passengers awaiting service integrated service at the food counter which had previously been given to other interstate passengers only on a segregated basis, deprived them of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. *Cooper v. Aaron*, supra, held that the petitioner's constitutional rights could not be annihilated by municipal or State officials. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961), the Supreme Court of the United States held that a restaurant owned by a municipality but leased to and operated by private persons cannot discriminate in the service of food to the public on the basis of color.

VI.

The arrests and convictions are invalid for the rea-

son that they are in conflict with the provisions of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C.A. Sec. 1301 et. seq.), and in particular Section 404 of said Act (72 Stat. 760, 49 U.S.C.A. Sec. 1374) which provides, in pertinent part, that:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TOBIAS SIMON and HOWARD W. DIXON
Attorneys for Petitioners
706 Ainsley Building
Miami 32, Fla.

By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, been served by mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, by air mail this _____ day of November, 1962.

_____

APPENDIX A

[TITLE OMITTED]

OPINION OF THE SUPREME COURT OF FLORIDA

Filed November 1, 1961.

An Appeal from the Municipal Court, in and for the City of Tallahassee, John A. Rudd, Judge.

THORNAL, J.

We have for consideration a motion to dismiss a direct appeal from the Municipal Court of the City of Tallahassee.

We must decide whether this Court has jurisdiction to consider the appeal.

The City charged that the appellants did "unlawfully assemble . . . contrary to the laws and ordinances of said City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida." A trial in the municipal court culminated in a finding of guilt and a sentence to pay a fine with an alternative term in the city jail. At the outset of the trial the appellants moved to dismiss the complaint with the contention that Section 870.04, Florida Statutes, as amended by Chapter 61-237, Laws of Florida, 1961, was being invalidly applied against them. The City Judge announced that "the statute is not unconstitutional on its face." Coming here directly from the municipal court appellants contend that the trial judge passed directly on the validity of a state statute and that we, therefore, have jurisdiction pursuant to Section 4, Article V, Florida Constitution. The appellee's motion to dismiss questions the juris-

diction of this Court to determine the matter on a direct appeal. This motion has been argued and is now here for disposition.

The appellants were charged with the violation of the municipal ordinances of the City of Tallahassee. Nowhere in the complaint were they charged with a violation of a state statute. A reference to Section 870.04, supra, as amended, will reveal that the statute condemns a riotous assembly and provides a penalty under Section 870.02, Florida Statutes. The offense described in the statute is a misdemeanor triable in the state courts. The statute does not even impliedly define a municipal offense. This distinction is important in determining our jurisdiction. It is perfectly clear that the municipal judge was not confronted by the necessity of passing directly on the validity of a state statute. The most that could be said would be that he was called upon to pass upon the validity of a municipal ordinance. In actuality, the record indicates that he was merely requested to decide that "the statute" was invalid "as applied to the appellants." The real contention asserted before the trial judge questioned the application of the statute, rather than its fundamental validity.

This Court derives its appellate jurisdiction from Article V, Florida Constitution. By Section 4(2), Article V, supra, appeals from trial courts may be taken directly to this Court from certain specified types of judgments. Among these are "final judgments or decrees directly passing upon the validity of a state statute . . . or construing a controlling provision of the Florida or federal constitution . . . " We must look to this constitutional provision as the source of our jurisdiction to entertain the instant appeal.

It is clear that the trial judge, at most, was called upon to pass upon the validity of a municipal ordinance. This is so because the appellants were charged with a violation of the municipal ordinances, rather than with a violation of a state statute. We have long ago held under Section 4(2), Article V, supra, that this Court did not have the power to entertain a direct appeal from a judgment of a trial court which merely passes upon the validity of a municipal ordinance. For purposes of determining the jurisdiction of this Court, a municipal ordinance cannot be classified as a "state statute." Armstrong et al v. City of Tampa, Fla. 1958, 106 So. 2d 407. While conceivably a municipal court could be considered as a "trial court" from which a direct appeal could come here if in some peculiar situation the municipal court passed directly upon the validity of a state statute, such is not and could not have been the instant situation. Boyd v. County of Dade, Fla. 1960, 123 So. 2d 323. Moreover, even though the appellants attempted to question the validity of the application of the cited statute, they did not in any fashion assault the fundamental validity of the statute itself. Jurisdiction comes to us by direct appeal when the validity of the statute is assaulted and passed upon. When the problem involves the validity of the application of an otherwise valid statute, a direct appeal here is not available unless there be a final judgment or decree which construes a controlling provision of the State or federal constitutions. Stein v. Darby, et al., opinion filed October 11, 1961. In the instant case there was certainly no such construction. The final judgment of the municipal judge merely contained a finding of guilt and the assessment of the fine. Nowhere in the record is there a construction of the constitution. Armstrong v. City of Tampa, supra.

Although ordinarily motions of the type involved here would be disposed of without opinion, we deemed it appropriate to elaborate on our reasons for the future guidance of the Bar.

Finding as we do that this Court is without jurisdiction to hear the instant appeals, the motion to dismiss is well-taken. However, we will treat the motion as a motion to transfer an appeal improvidently lodged in this Court. Rule 2.la (5)(d), Florida Appellate Rules. Under Section 6, Article V, Florida Constitution, the circuit courts have jurisdiction to hear appeals from municipal courts when they involve questions such as those presented here. It is, therefore, ordered that within five days from the filing of this opinion all papers, records, briefs and other documents, including the notice of appeal, be and the same are hereby transferred to the Circuit Court, Second Judicial Circuit for appropriate disposition. Our opinion is not to be construed as in any fashion passing upon the merits of the appeal or the sufficiency of the record, including the notice of appeal. These are matters to be disposed of by the circuit court in the exercise of its appellate jurisdiction.

It is so ordered.

ROBERTS, C. J., HOBSON, DREW and O'CONNELL, JJ., concur

APPENDIX B

[TITLE OMITTED]

ORDER AFFIRMING JUDGMENTS OF THE CIRCUIT COURT OF LEON COUNTY, FLORIDA

This is an appeal from convictions in the Municipal Court of the City of Tallahassee, Florida of the ten appellants named in the caption who were charged with unlawful assembly. A fine was assessed against each of them with an alternate jail sentence.

The formal charge is in a single count naming the ten appellants and three others* as defendants and alleges an unlawful assembly on June 16, 1961 "in that, they being more than three (3) persons, met together to commit a breach of the peace, acting together and concertedly to occupy and continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled" were commanded by a police officer of the city, after identifying himself as such, to immediately and peaceably disperse, and they refused or neglected to do so.

*Of these three one was acquitted and the other two were granted a nolle prosequi.

The appellants contend that the judgments pursuant to convictions violate their rights guaranteed by the Florida and United States Constitutions in that they have been denied the equal protection of the laws and have been deprived of liberty or property without due process of law. They contend that the state statute, Chap. 61-237, Laws of 1961, (F. S. 870.04), (which, by reference adoption in a municipal ordinance,* is made an ordinance of the City of Tallahassee) is unconstitutional and void, either on its face or as it has been applied to the appellants in this case.

The pertinent portions of the statute, adopted as an ordinance, are:

> "If any number of persons . . . are unlawfully, riotously or tumultuously assembled in any . . . city or municipality . . . any . . . police officer of said city or municipality . . . shall go among the persons so assembled . . . and shall, in the name of the state command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said [officer] shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present . . . when required by such [officer] to depart from the place, refuses or neglects to do so, he shall be deemed one of . . . the persons unlawfully assembled and may be prosecuted and punished accordingly."

*Sec. 23-38, Tallahassee Code, provides that it shall be unlawful for any person to commit any act which is or shall be recognized by the laws of the state as a misdemeanor. The penalty is a maximum fine of $500.00 or 60 days imprisonment or both.

The facts in the case are not in dispute and squarely present the question as to whether or not the conduct of the appellants was an exercise by them of rights they hold under state and federal constitutional provisions, which would preclude their prosecution, conviction and sentence for unlawful assembly in the trial court.

The appellants are clergymen, two being rabbis and the others being ordained ministers of several Protestant denominations. They are residents of New Jersey, New York, Massachusetts or Connecticut. Some of them are of the white race and some are negroes. About June 12 or 13, 1961 they, together with eight other clergymen from the same general area, departed from Washington, D. C. by interstate common carrier bus for a so-called "Freedom Ride" into Virginia, the Carolinas, Georgia, and Florida. The bus ride terminated in Tallahassee June 15, 1961. The "Freedom Riders" left their buses at the Greyhound bus terminal there and went into the terminal lunch room to obtain food which was served them.

This trip was sponsored and at least partially financed by an organization known as C O R E (Congress on Racial Equality) which has been aggressive in promoting racial integration and desegration. The trip was well publicized, having been given wide coverage in all news media including radio and television. The time and place of arrival in Tallahassee was heralded and well known.

The purposes of the "Freedom Ride", as stated by appellant Collier, who was the spokesman for the group, were two-fold: (1) To ascertain whether or not there were

facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which they would pass; and (2) To bear witness as ministers, rabbis and clergymen to the struggle to obtain those rights "guaranteed us by the Constitution."

Shortly prior to the time the buses bearing the "Freedom Riders" were scheduled to arrive at about noon on June 15, there had gathered in the vicinity of the bus station a number of persons and groups of persons. Law enforcement officers, including city police, had been dispatched to the area to prevent any disturbance. It was suspected that resentment against the "Freedom Riders" might result in some attempts at violence toward them or precipitate other disorders. When the buses arrived, law enforcement personnel moved in and gave protection to the passengers as they left the bus and entered the lunch room in the terminal. Apparently they were served in the lunch room under circumstances and policies satisfactory to them.

In approximately an hour after arrival at the bus terminal the eighteen "Freedom Riders" proceeded to the Tallahassee Municipal Airport ostensibly for the purpose of boarding a 3:25 P. M. Eastern Air Lines plane for passage to Washington, Newark, or New York. They were transported to the airport in private cars presumably furnished by local sympathizers with their objectives.

Upon arrival at the airport they found that the restaurant there had been closed. When the time approached for arrival of the 3:25 plane the ten appellants cancelled the reservation they had previously made for the flight.

The other eight boarded the plane when it arrived and departed for their destinations in the East.

At that time, the airport arrangement provided separate waiting rooms, or areas, for white and negro; also separate rest rooms; and separate areas for serving food, the white area being a glassed-in place and the negro consisting of a counter with several stools. However, as mentioned before, the eating service had been discontinued by the closing of the restaurant facilities. A sandwich vending machine was in the lobby, but the prices on same had been marked up from previous prices.

The appellants stayed together in a more or less compact group in the lobby area most of the time and no attempt was made to enforce separation of the races in the waiting room. Rest rooms were used by them without observing the designation of the segregated facilities.

After cancelling their reservations for the 3:25 P. M. flight they sought and ultimately obtained reservations for a flight the next morning at 8:25 on an E. A. L. plane. They remained in the airport until about 11:00 P. M. that evening for the purpose of observing if the restaurant would open and service be granted to them. The restaurant remained closed.

Law enforcement officers, including city police, were detailed to keep order. The activities and objectives of the appellants had been the subject of news reporting and groups of people were seen to be gathering or attempting to gather in the vicinity of the airport. There were critical and hostile comments made about the appellants. The police turned away some of those gathering when it

was apparent such persons had no airport business or interest. Persons were even screened at the entrance and turned away by officers if they had no business to transact at the airport.

The chief of police advised the appellants that the airport terminal would close for the night at approximately 11:45 P. M. and a spokesman for appellants requested protection as they moved from the airport into the city and also on the return to the airport the next morning. Such protection by escort of law enforcement officers was provided.

The appellants thus left the airport at about 11:00 P. M. on the 15th to return the next morning prior to the scheduled departure at 8:25 A. M. of the plane on which they had obtained reservations. They were given escort security protection on both the occasions of leaving and returning to the terminal.

The restaurant was also closed on the morning of June 16. At 8:15 A. M. all ten of the appellants cancelled their reservations for the 8:25 flight and remained in the waiting room after that flight had departed. At 8:20 A. M. they sought, and ultimately obtained, reservations on a National Airlines flight scheduled to depart at 1:47 P. M. that day, but cancelled just prior to noon.

During these periods there continued to be movements and gathering of groups of people in cars and there was a hostility and open resentment against the conduct and attitudes of the appellants. A considerable number of police, sheriff's deputies and highway patrolmen had been detailed to prevent disorder. City, county and state

officials, including the Governor, were apprehensive and moved to provide necessary law enforcement personnel to preserve order.

At about 12:15 P. M., Mr. James Messer, Jr., city attorney of Tallahassee and a special police officer of the city, after conferring with the mayor and chief of police of the city, approached the appellants who were together and inquired if there was a leader of the group. Appellant Collier arose and identified himself and assumed to act as spokesman. Mr. Messer identified himself and his official positions, exhibiting his police badge. Others in the group gathered around Mr. Messer and Rev. Collier and Mr. Messer read to them a proclamation. He stated that the assembly of the appellants at the Municipal Airport of Tallahassee will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee at its Municipal Airport over which the city had jurisdiction. He mentioned incidents of the previous night and fears of more unrest. He then commanded them in the name of the state and city to immediately and peaceably disperse, and explained that such meant from the airport property. He then added that failure to so disperse would result in arrest for unlawful assembly. Collier asserted that they were interstate passengers, to which Messer replied that he did not consider them to be bona fide passengers in view of their reservation cancellations.

Several local sympathizers with the appellants dispersed, but appellants failed to do so. After about 1½ minutes, Mr. Messer turned to the Chief of Police and remarked "Chief, you can carry out your orders." The appellants were arrested and taken into custody.

The appellants take the view that the segregation

practices with regard to waiting rooms, rest room facilities, and restaurant or eating facilities at the airport were violative of constitutional guarantees of equal protection of the law. They would also inject into the case the installation of sandwich and cigarette machines, at or just prior to their arrival, which inflated the prices of merchandise vended to double what it had been. The closing of the restaurant on the day of their arrival and its opening shortly after their departure is viewed as an important factor.

These facts are, in the view of this Court, not at all significant in the legal problems involved in the charge against the appellants and the disposition of such charge by the trial court.

The municipality of Tallahassee operates in a proprietary capacity and in a governmental capacity. Among its proprietary functions is the ownership and operation of a municipal airport and supervision over the concessions there. Assuming, but not deciding, that its policies of segregation of the races in its facilities are unlawful and did constitute a violation of some duty to the appellants if enforced against them, and further assuming, without deciding, that the closing of the restaurant under the circumstances violated some duty to them, do such circumstances justify a concerted protest demonstration by appellants of their views and convictions over a protracted period of time during which tensions and tempers rise in the community which threaten to erupt into disorder and thus render the city, in its governmental capacity, powerless to terminate the demonstration in the exercise of its police power?

Stated another way, may not a lawful assembly for the purpose of protesting and demonstrating opposition to a course of policy practiced by the municipality become an unlawfully assembly when pursued to unreasonable lengths imposing unreasonable burdens on others, after the lawful objectives of the demonstration had been fairly accomplished?

It is fundamental that our constitutions accord to the citizen of the United States the right of freedom of speech and of assembly and to peaceably petition for a redress of grievances. Such freedoms are jealously guarded and when exercised in good faith and in good order may not be lawfully interfered with by governmental action. However, it is not a license to take into one's own hands the enforcement of law or by excessive harassment, effect coercion and acceptance of one's convictions and interpretations of legal rights by governmental entities whose policies are in conflict. Such procedures wholly ignore the very machinery provided by the constitutions and laws of the nation and state for the declaring, securing and enforcement of constitutional and other legal rights. It is the courts, both state and federal, to whom resort is readily available for citizens to seek recognition and enforcement of legal rights and immunities. That such courts may not move as swiftly as the individual would wish does not authorize pursuit of personal means which unnecessarily create or threaten public disturbance or disorder, or which substantially interfere with normal, orderly functions of a public facility.

Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government.

The appellants, prior to the reading of the riot act to them, had achieved their announced objectives. They had observed both at the bus station and the airport the integration or lack of it of the waiting room, rest room and restaurant facilities. They had very effectively borne witness as clergymen and otherwise of their sympathy with the struggle to obtain desegregation of the various facilities of interstate travel.

To accommodate and facilitate those legitimate objectives the law enforcement agencies of city, county and state had given protection against potential violence or other disorder from groups or individuals who resented the activities of the appellants. This protection was afforded at the bus station, at the airport on the afternoon of June 15, on the evening of June 15 when the appellants left the airport to come into town and on the following morning when they returned to the airport purportedly to take an early plane. However, instead of using the reservations they had obtained they made a cancellation. This was thrice they had made last minute cancellations of reservations for the sole reason that they wished to eat in the restaurant, which was closed. In the meantime their conduct and persistence was arousing increased resentment and anger in the community with threats of violence and disorder toward the appellants.

Obviously, the conduct of appellants had revealed a pattern. They would make reservations for travel, wait in the lobby until just before the plane they were scheduled to take arrived and then cancel, make reservations on a later flight and then again cancel at the last minute, at all times remaining in the airport but never taking a plane. The effect is obvious. The seats and other facilities

are occupied by them and their use denied to those who actually wished to travel. The use of rest rooms and wash rooms by them partakes more of lodging than a comfort feature for those whose sole purpose is some airport business. The reservation of space and last minute cancellation prevented the use of that space of the flights involved, resulting in loss and inconvenience to the air line involved and probable denial to other would-be travelers of the use of that space. The sole purpose of such a course of harassment was to goad the municipality and its restaurant lessee to open the restaurant and gratify the appellants' wishes that they be served in the style and manner they deemed to be their right.

Controversies between citizens and governmental units are not unique. In nearly every instance there is a conflict in what the citizen contends he has a right to claim and the governmental entity which would deny the validity of such claim. The citizen may freely express his views and seek to cultivate converts to them with a view of bringing moral or political pressures on the officers of the public body to accord his demands. However, such means must be exercised in a manner that is reasonable and not harmful to the rights of others or the peace and good order of the community. Especially is this true when the controversy is one of public interest in which there are strong and emotional feelings on the part of a substantial number of persons in the community.

The courts, both state and federal, are open to resolve controversies on constitutional issues in duly instituted and processed civil actions. Indeed, the very issue in the demonstrations of the appellants was subsequently presented to and adjudicated by the United States Dis-

trict Court for the Northern District of Florida. Brooks, et al v. Tallahassee, 202 Fed. Supp. 56. When citizens press their demonstrations in behalf of a cause (however worthy they deem their objectives to be) beyond the bounds of fully and effectively delivering their message and reach the stage that they materially and harmfully interfere with the orderly business and lawful activities of others, who are acting in public or private capacities, then the conduct is disorderly and assembly for carrying it out is unlawful. Such was the case here.

The judgments appealed from are hereby affirmed.

Affirmed.

BEN C. WILLIS
Circuit Judge

APPENDIX C

MOTION TO QUASH AND DISMISS PRIOR TO ARRAIGNMENT BEFORE THE MUNICIPAL COURT IN AND FOR THE CITY OF TALLAHASSEE, a Municipal corporation of Florida.

MR. SIMON: At this time, if your Honor please, the defense will move to quash and to dismiss the charges against these defendants on the following grounds:

First, that the charges of the City of Tallahassee do not state an offense against the defendants under the ordinances of the City of Tallahassee or the statutes of the State of Florida.

Second, the alleged offenses occurred beyond the city limits of the City of Tallahassee and this Court is without jurisdiction to try these offenses.

Third, the statute pursuant to which the defendants were arrested and with which the defendants are charged and which they are charged with having violated, namely Florida Statutes, Chapter 61-237, is invalid and is unconstitutional, constitutes a denial of rights under the Declaration of Rights of the Florida Constitution and constitutes a denial of rights under the Federal Constitution to the United States and the First and Fourteenth Amendments thereto and as a consequence these arrests were unlawful and the charges based thereon are without foundation.

Next, the defendants which constitute a party of Negroes and whites who were located in a municipally-

owned airport in the City of Tallahassee and were attempting to use the public facilities of this airport on a racially unsegregated basis acted at all times in a peaceful and dignified manner; their arrests constitute a denial to the defendants of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution and a denial of due process of law, a denial of privileges and immunities of State citizenship guaranteed thereby; a denial of the privileges and immunities of Federal citizenship since they were at all times on and in an instrumentality of the municipality of Tallahassee and were attempting to use the facilities thereof, which facilities are required by Federal law to be made available to all citizens without regard to their race or color.

Next the defendants at the time of the arrests were passengers in interstate commerce awaiting departure at the Municipal Airport of Tallahassee of their plane from Tallahassee to points beyond the State of Florida and their arrests constitute a violation of their rights of unfettered travel free of racial discrimination under the Interstate Commerce Clause of the Federal Constitution, namely Article I, Section 8, Clause 3, and a violation of their privileges and immunities of Federal citizenship, a violation of the Federal Aviation laws and a violation of the Federal Aviation Act of 1958 and, in particular, Section 404 of said act, same being 72 Statute 760, 49 U.S. Code, Section 1374-B.

The arrests of the defendants and their prosecution constitute a violation of their liberty of contract as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Next, the acts of the City officials in arresting and in participating in the arrests of these defendants and these prosecutions based thereon and the concomitant failure of the City officials to arrest certain other persons in the vicinity who were threatening to exhibit acts of violence because of the defendants' presence at the aforesaid airport and because of the defendants' endeavor to use the airport facilities on an unsegregated basis constitutes racial discrimination in violation of the due process clause —

THE COURT: Hold on a minute.

Are you making a motion, arguing a motion or are you testifying?

MR. SIMON: I am making a motion.

THE COURT: Leave out your facts and make the motion according to law.

MR. SIMON: (Continuing) —in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and corresponding provisions of the Florida Constitution whereby the defendants respectfully move this Court to quash and dismiss the information and charges herein filed.

APPENDIX D

ASSIGNMENTS OF ERROR.

1. The Court erred in entering its judgment against the defendants for the reason that the statute pursuant to which the defendants were arrested and which the defendants are charged with having violated, namely, F.S. Chapter 61— is invalid and unconstitutional and violates the rights of the defendants under the Florida and Federal Constitutions and denies to them the due process of law and the equal protection of laws and consequently, the defendants were unlawfully and illegally arrested and the charges placed against them were without foundation.

2. The Court erred in entering its judgment against the defendants for the further reason that the said arrests and charges constitute a denial to the defendants of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution; a denial of due process of law guaranteed thereby; a denial of the privileges and immunities of State citizenship guaranteed thereby; and a denial of the privileges and immunities of Federal citizenship since the defendants were deprived of restaurant facilities in the Tallahassee Municipal Airport owned and operated as an instrumentality of the City of Tallahassee, by reason of their color or association with persons of color, and the said facilities were not made available to them without regard to their race or color.

3. The Court erred in entering its judgment against the defendants for the reason that the defendants were passengers in interstate commerce awaiting departure of their plane from Tallahassee to points outside the State

of Florida, and consequently the racially discriminatory arrests and prosecutions brought against the defendants, constitute a violation of their rights of unfettered travel free of racial discrimination under the Interstate Commerce Clause of the Federal Constitution (Article I, Section 8, Clause 3), a violation of their privileges and immunities of Federal citizenship, a violation of the Federal Aviation Laws, and a violation of the Federal Aviation Act of 1958, and in particular, Section 404 of said Act (72 Stat. 760; 49 U.S.C.A., Section 1374 (b)).

4. The Court erred in entering judgment against the defendants for the reason that the arrests of the defendants and their prosecution in view of the evidence constitutes a violation of their liberty of contract as guaranteed by the Fourteenth Amendment to the Federal Constitution.

5. The Court erred in entering its judgment against the defendants for the reason that the acts of the City officials in arresting and prosecuting the defendants who constituted a party of Negroes and persons in association with Negroes and who were peaceable, quiet, and dignified at all times, constitute patent racial discrimination by a municipality in violation of the due process clause and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. The Court erred in entering its judgment against the defendants for the reason that the same was contrary to the weight of the evidence.

7. The Court erred in entering its judgment against

the defendants for the reason that the same was contrary to law.

8. The Court erred in entering its judgment against the defendants for the reason that the arrests of the defendants and their subsequent trial and conviction by the Municipal Court in and for the City of Tallahassee constituted racial discrimination against the defendants by reason solely of their color or association with persons of color in violation of the obligations placed upon the States by the Fourteenth Amendment to the Constitution of the United States not to discriminate against any person or persons solely by reason of their color or associations with persons of color.

9. The Court erred in entering its judgment against the defendants for the reason that the arrests of the defendants by peace officers and public officials of the City of Tallahassee and the defendants' subsequent trial and conviction in and by the Municipal Court in and for the City of Tallahassee, constituted State aid of racial discrimination against the defendants by reason solely of their color or association with persons of color by a lessee-restauranteur (at the airport) of the City of Tallahassee, in violation of the obligations placed upon the States by the Fourteenth Amendment to the Constitution of the United States not to discriminate against any person or persons solely by reason of their color or association with persons of color, and also in violation of the Federal Aviation Act of 1958 and in particular, Section 404 of said Act (72 Stat. 760; 49 U.S.C.A., Section 1374 (b)), and in further violation of the obligations placed upon the City of Tallahassee, a Florida Municipal Corporation, by the provisions of F.S. 332.08 (3).